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IN THE

Supreme Court of the United States

October Term, 1970

No. 71-146

WALTER E. CRAVEN, WARDEN,

Petitioner,

vs.

DANIEL WILLIAM ALESI,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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WALTER E. CRAVEN, WARDEN,

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DANIEL WILLIAM ALESI,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Walter E. Craven, Warden, hereinafter referred to as petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in Daniel William Alesi v. Walter E. Craven, Warden, on April 1, 1971, case number 24821.

Opinions Below

The opinion of the Court of Appeals is as yet unreported and is appended hereto as Appendix A. The opinion of the United States District Court for the Central District of California is unreported and is appended hereto as Appendix B. The opinion of the California Supreme Court affirming the judgment of conviction is reported as *People v. Alesi*, 67 Cal. 2d 856, 64 Cal. Rptr. 104, 434 P. 2d 360 (1967).

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit in *Alesi v. Craven* was entered on April 1, 1971. A motion for rehearing and request for rehearing en banc was denied on May 14, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

Questions Presented

1. Whether the argumentative persuasion of defense counsel in a criminal case as to the proper course of action for his client, the respondent, can amount to coercion invalidating respondent's guilty plea and admissions to a probation officer made after the plea?

2. Whether respondent's admissions to the probation officer, if improperly obtained, were nevertheless properly admitted as rebuttal evidence under *Harris v. New York,* 39 U.S.L.W. 4281 (February 24, 1971), as an aid to the jury in assessing respondent's credibility?

3. Whether the admission of respondent's statements as rebuttal evidence, if improper, was harmless error beyond a reasonable doubt under *Chapman v. California,* 386 U.S. 18, 24 (1967).

Constitution and Statutory Provisions Involved

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. It also involves the general authority of the United States District Court to grant habeas corpus relief under 28 U.S.C. section 2254(d). (Appendix C.)

Statement of the Case

Respondent Daniel William Alesi and a codefendant, Patricia Lee Hardy, were charged by indictment with two counts of sale of heroin, a felony, in violation of section 11501 of the Health and Safety Code of the State of California. Respondent Alesi was further charged in a separate information with possession of marijuana, a felony, in violation of section 11530 of the Health and Safety Code of the State of California. A prior felony narcotics conviction, a violation of section 11500 of the Health and Safety Code of the State of California, was alleged against Alesi as to all counts.

Alesi pleaded not guilty and denied the prior conviction. During the course of the trial, counsel stipulated to a mistrial, which the court ordered. On motion of the People the allegation of the prior conviction was stricken. Alesi then pleaded guilty to one count of sale of heroin and petitioned under section 6451 of the Penal Code of the State of California (now section 3051 of the Welfare and Institutions Code) for commitment as a narcotics addict, and this was granted.

In subsequent interviews with the probation officer, Alesi admitted he was a regular user of heroin and that the marijuana cigarette found on his person belonged to him. He did not admit the sales of heroin.

Alesi was sent to the California Rehabilitation center for narcotics addicts, but he was returned shortly to court as being an unfit subject for treatment. (Cal.

Pen. Code, section 6453, now Cal. Welf. & Inst. Code, section 3053). Alesi thereupon moved to withdraw his guilty plea. The motion was granted.[1] The allegation of the prior narcotics conviction was reinstated.

The case was then retried to a jury. Alesi testified at the retrial and his statements to the probation officer were introduced to impeach him. On cross-examination Alesi testified that his admissions to the probation officer were made on the advice of his attorney. Alesi was found guilty as charged by the jury of two counts of selling heroin and one count of possession of marijuana. The allegation of the prior felony narcotics conviction was found to be true. Alesi was sentenced to imprisonment in the state prison for the terms prescribed by law, with the sentences to run concurrently on all counts.

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[1]The Ninth Circuit stated in its opinion that the state court trial judge vacated Alesi's plea "upon a finding that it was involuntary . . ." (Opinion, p. 2.) The District Court made a similar finding. The support for this conclusion purportedly comes from the trial judge's statement that "perhaps it could be said that the Court's actions apparently substantially corroborated his (Alesi's) hopes or beliefs that he would get treatment rather than himself a straight prison sentence," and from the statement of Alesi's counsel that he had exerted a "strong force" on Alesi to withdraw his plea of not guilty and to plead guilty. [Ex. 7, pp. 6, 16-17.]

We submit that the District Court and the Ninth Circuit have misinterpreted the effect of the trial judge's statement and actions. Rather than finding the plea of guilty involuntary, the trial judge allowed Alesi to withdraw his plea of guilty in the exercise of his discretion. Since the hope of a commitment was gone, the trial judge, who had suggested the possible commitment, felt it was fair that Alesi should be allowed to reinstate his original plea of not guilty. The trial judge had discretion under California law to allow the plea of guilty to be withdrawn without finding the plea involuntary. *E.g. People v. Clark*, 264 Cal. App. 2d 44, 46-47, 70 Cal. Rptr. 324, 325-26 (1968). We submit that what the trial judge did here involved an exercise of discretion under all the attendant circumstances, not a finding of involuntariness.

Alesi appealed and the judgment was ultimately affirmed by the California Supreme Court in a unanimous opinion. *People v. Alesi,* 67 Cal. 2d 856, 64 Cal. Rptr. 104, 434 P. 2d 360 (1967). A petition for rehearing was denied.

A petition for habeas corpus relief was subsequently denied without opinion by the California Supreme Court, Alesi having asserted among other grounds that he was denied due process of law by the admission of his assertedly involuntary statements to the probation officer.

On August 12, 1968, Alesi petitioned for habeas corpus relief in the United States District Court for the Central District of California. An evidentiary hearing was held. The District Court granted the writ. A petition for a rehearing was denied on July 30, 1969.

On April 1, 1971, the United States Court of Appeals for the Ninth Circuit affirmed the order vacating the California Supreme Court's decision. *Alesi v. Craven,* 9th Circuit No. 24821. A motion for rehearing en banc was denied on May 14, 1971. A motion to stay issuance of the mandate was granted on May 25, 1971.

Statement of Facts Pertinent to the Questions Presented

a. Facts Developed at the Trial

The facts relative to respondent Alesi's guilt are succinctly summarized in the opinion of the California Supreme Court affirming the judgment as follows:

> "On June 12, 1962, [Los Angeles County Deputy Sheriff John L.] White, a narcotics undercover agent, gave $40 to Robert Baldry, an informer, and Baldry handed the money to defend-

ant [Alesi], who was accompanied by Patricia Hardy, originally a codefendant in this action.[1] While Baldry and Miss Hardy circled the block in the latter's vehicle, defendant Alesi entered a restaurant, and when he rejoined the others he was carrying three ballons in his mouth. They returned to Baldry's apartment, and as they parked Alesi handed two of the balloons to Baldry. After the three reentered the apartment, where White had remained, Baldry handed White the two balloons which were subsequently proved to contain heroin. Miss Hardy retained the balance of the heroin, and she later gave the last balloon to White.

"On June 15, 1962, three days later, a second transaction was consummated by prearrangement. On this occasion White handed Miss Hardy $75, and she departed in her car to obtain the heroin. Shortly thereafter Miss Hardy returned, informed the deputy that she would retain a gram of heroin for her services and then gave the balance of the narcotics to Alesi, who attempted to tie a knot in the balloon in which it was contained. White took the heroin from Alesi.

"On the basis of White's investigation and the foregoing events, a warrant was issued for the arrest of defendant Alesi. Three deputies, Meyers, Lesnick, and White, effectuated the arrest in the early morning at the apartment of Janice Kline, another acquaintance of defendant. Meyers made a quick search, which uncovered in Alesi's shirt pocket a 'cocktail,' a tobacco cigarette embellished at the tip with an inserted hand-rolled cigarette

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[1]Miss Hardy pleaded guilty.

found to contain marijuana. The officer immediately asked Alesi if the 'cocktail' was his and he admitted it was, and, in response to a second question, admitted it contained marijuana.

"As the deputies and defendant proceeded to the police station following the arrest, Meyers asked him if he knew White, and he indicated that he recognized him but insisted that he was not guilty of the sales. There was no further police interrogation.

". . . . During the course of the trial, counsel stipulated to a mistrial, which the court ordered. The People moved to strike the allegation of defendant's prior felony narcotics conviction, and this was granted. He then pleaded guilty and petitioned under Penal Code, §6451 (now Welf. & Inst. Code, §3051) for commitment as an addict, and this was granted.

"In subsequent interviews with John Linker, his probation officer, defendant admitted he was using heroin on a regular basis, that the marijuana cigarette belonged to him; however, he did not admit the heroin sales with which he was charged. These admissions were made both orally and in a written statement submitted by him to the probation officer.

"Defendant was sent to the California Rehabilitation Center, but was thereafter returned to court as being an unfit subject for treatment in that institution (Pen. Code, §6453, now Welf. & Inst. Code, §3053). He thereupon moved to withdraw his plea of guilty, and this motion was granted. At the same time, the allegation of the prior narcotics conviction was reinstated. At

this point, defendant's first counsel, Richard Walton, was permitted to withdraw, and new counsel was appointed by the court. Upon retrial, defendant was found guilty as indicated above.

". . . .

"After the first trial, defendant pleaded guilty on the advice of his attorney so that prompt commitment to the California Rehabilitation Center could be arranged. At an oral interview following his plea, he told his probation officer that he was using heroin and that the marijuana cigarette discovered by the arresting officers was his. Defendant also submitted a statement in his own handwriting in which he confessed to marijuana possession and also admitted heroin use, although he did not admit the sales charged in the indictment. At the second trial, he denied the marijuana possession, and his written statement was introduced for impeachment purposes. On cross-examination he testified that his admissions to the probation officer were made on the advice of his then attorney [Mr. Walton]." *People v. Alesi, supra,* 67 Cal. 2d at 858-60, 64 Cal. Rptr. at 105-07, 434 P. 2d at 361-63.

b. Evidentiary Hearing Facts Concerning Alesi's Plea of Guilty and Statements to the Probation Officer.

Alesi's attorney during the first trial, Mr. Richard A. Walton,[2] testified at the evidentiary hearing that during the course of the first jury trial, the trial judge, Judge Robert Clifton, asked to see counsel in chambers. (Evid. Hear. Tr. pp. 90-91.) At that point in the trial

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[2]Mr. Walton is a prominent, able and well respected criminal defense attorney in Southern California.

the prosecution had completed its case and Walton was putting on a defense. Walton was of the opinion at that point that the verdict would be guilty as to one of the sale counts and as to the marijuana count. (Evid. Hear. Tr. p. 92.)

The trial judge asked Walton if Alesi would be eligible for commitment to the California Rehabilitation Center (CRC) for narcotics addicts. Walton told the judge that he had never discussed the matter with appellee. (Evid. Hear. Tr. p. 93.) The reason for this was that Walton had not thought that such a disposition would be entertained by the court or the prosecutor. Walton testified: "Had I thought that kind of disposition were even possible in the case I might have promoted it myself in the first instance." (Evid. Hear. Tr. p. 108.) With the allegation of the prior conviction, Alesi was not eligible for commitment because the law provided for a minimum term of ten years in prison in such circumstances. Until the trial judge intervened, with the concurrence of the District Attorney, the prior conviction allegation barred even the possibility of commitment. (Evid. Hear. Tr. pp. 93, 108-9.) Thus, although the possibility of commitment was suggested by the court, Walton testified that it was Walton's own independent decision that a commitment would be in the best interests of Alesi. (Evid. Hear. Tr. p. 108.)

Judge Clifton asked Walton if Alesi was a narcotics user. Walton said he felt Alesi was. Judge Clifton suggested a commitment would be a just disposition of the case. Walton told Judge Clifton that Alesi was not eligible as the case was then pleaded, since the prior narcotics conviction was alleged against Alesi. Judge Clifton then asked the prosecutor if he would move to strike the prior conviction. The prosecutor said he

would consult with his superiors to determine whether he could have such authorization. (Evid. Hear. Tr. pp. 93-94.)

The prosecutor made some telephone calls. He was denied authorization to strike the prior by the District Attorney's chief trial deputy, but ultimately obtained authorization from the number two man in the District Attorney's office, the Chief Assistant District Attorney, Manley Bowler. Bowler gave the authorization because Judge Clifton had very strong feelings about the case and felt that Alesi belonged in a rehabilitation center. (Evid. Hear. Tr. pp. 94-95.)

Walton told Alesi about the conversation in chambers and the prospective disposition of the case if Alesi "were inclined to go along with it." Walton felt there was a strong likelihood Alesi would be eligible for commitment at CRC if the prior were stricken. (Evid. Hear. Tr. p. 96.) Walton was aware that Alesi was on parole at the time with respect to the prior narcotics conviction which had been alleged against him in the instant case. Walton was quite familiar with CRC practices with parolees and assumed that he told Alesi it was possible that parole would be revoked, which would result in Alesi's ineligibility for CRC. (Evid. Hear. Tr. p. 100.)

Reflecting on all the consultations, Walton was quite confident that the fact Alesi was on parole was very much on everyone's mind, because that fact affected Alesi's suitability (but not his eligibility) for CRC commitment. There was always the pospect that Alesi might be returned to prison. Walton did not specifically recall whether he so advised Alesi, but he testified he could not "conceive that I would not have under

all the circumstances." (Evid. Hear. Tr. p. 112.) Walton recalled a very exhaustive, prolonged conversation with Alesi, who was always very interested in what was happening with his case and had strong feelings about what should be done. In view of the relationship between Alesi and Walton, Walton testified it would have been "very unlikely that any stones would have been left unturned." (Evid. Hear. Tr. p. 112.)

Walton testified that he probably discussed with Alesi the fact that he could be rejected in the discretion of the director of CRC, "because it was such a weighty factor you could hardly ignore it." (Evid. Hear. Tr. p. 109.)

Walton testified that plea bargaining is a common occurrence in criminal cases. (Evid. Hear. Tr. p. 105.)

Walton explained the agreement in the instant case to Alesi as follows:

> "I told him what the conversation had been in chambers; that in exchange for his plea of guilty the District Attorney would dismiss the remaining heroin sale count and the marijuana possession count; that the District Attorney would make a motion to strike the prior conviction; that the judge would grant that motion; that the judge would not sentence him to prison, but rather would refer him to Department 95 for addiction proceedings." (Evid. Hear. Tr. p. 103.)

When Walton subsequently moved to set aside Alesi's guilty plea he had told the court that Alesi had been "persuaded and even induced to withdraw his plea of not guilty." (Evid. Hear. Tr. p. 98.) Walton

explained at the evidentiary hearing exactly what that persuasion and inducement consisted of as follows:

> "This was an argumentative kind of persuasion, that (1) it was in his best interest to enter a plea of guilty to one count; secondly, that he would in all likelihood do many years less time in confinement; and, thirdly, he would be treated as an addict." (Evid. Hear. Tr. pp. 101-102.)

Walton persuaded Alesi to change his plea because Walton believed that was in Alesi's best interests:

> "I was very strongly of the opinion that the plea of 'Guilty' under all the circumstances was in Alesi's best interests; that if convicted on even one count of sale of heroin with a prior conviction—these are all things which I told him—that he would face a mandatory minimum term in prison of ten years, so he wouldn't be eligible for parole until 1973 or thereabouts, and not under any of those circumstances would he receive any treatment for his basic problem, which was addiction; that if he were to enter a plea of Guilty after the District Attorney had made a motion to strike the prior conviction, and the judge would then refer him to Department 95, that he would be processed at the Rehabilitation Center where he would be treated for his addiction where the minimum term is only six months, rather than ten years, and where at that time the average term of confinement was 15 to 18 months." (Evid. Hear. Tr. pp. 99-100.)

Alesi "had to be persuaded" by Walton; there was "a kind of reluctance" on Alesi's part. Apart from the above described argumentative persuasion of coun-

sel, Walton could not recall any other inducement or pressure used to get Alesi to plead guilty. (Evid. Hear. Tr. p. 102.)

Alsei testified at the evidentiary hearing that after the conference in chambers, Walton had a conversation with him. Alesi said, "It looks like I am going to get an acquittal here." Walton replied, "Yes, but you still have a parole violation to worry about." (Evid. Hear. Tr. p. 16.) Walton told Alesi about the conference and said that the judge and the attorneys wanted to help Alesi in going to the hospital with Pat Hardy. (Evid. Hear. Tr. pp. 16-17.) Watson said, "Well, Pat is getting hurt, this testimony involving her is hurting her." Alesi said, "I hate to see her get hurt." (Evid. Hear. Tr. p. 17.)

Walton said the judge wanted to commit Alesi to a new narcotics program at CRC. Alesi was not too familiar with it but had heard it was a good thing and that when he got out he would be on probation. Walton said, "If you don't go along with what the judge is recommending you will be violated and end up doing two years anyway, because they will get hard on you for, you know, not accepting help when it was offered." Alesi said, "Really, I am not addicted to nothing, no narcotics. I have been staying off of it since I have been out." (Evid. Hear. Tr. p. 17.)

Alesi denied at the evidentiary hearing having been addicted to narcotics in 1963 although he had been addicted in 1959. He had gone through a rehabilitation program in the penitentiary. (Evid. Hear. Tr. p. 18.) He had a job as a laboratory technician and did not need to engage in other activities to maintain himself. (Evid. Hear. Tr. pp. 19-20.)

Walton told Alesi that if he did not go along with the plan he would be "bucking City Hall." Alesi said, "I am too little to be bucking City Hall." Walton told Alesi to have confidence in what he was telling him, that it really was a deal, because Alesi would only end up doing a few months and then he would be paroled and just be on probation. (Evid. Hear. Tr. p. 20.) After this conversation Alesi changed his plea to guilty. (Evid. Hear. Tr. pp. 20-21.)

Alesi testified at the evidentiary hearing that he pleaded guilty because of Walton: ". . . I threw all my confidence to my attorney. He was suggesting that the court wants to help me, and the judge, and so forth. And being at one time an addict I thought maybe this could help me even further than what the penitentiary did. So I agreed to go along with it. At least it would make me show the people that I was making some effort, that I was serious, and that I was trying to straighten out." (Evid. Hear. Tr. p. 21.)

The District Attorney moved to strike the prior conviction, the motion was granted and Alesi pleaded guilty to one count of sale of heroin. (Evid. Hear. Tr. pp. 96-97.) Alesi's case was referred to a probation officer for a report. Walton did not recall having had any conversation with Alesi with respect to making any statement to a probation officer; this is not to say there was no such conversation. Walton was aware that Alesi would be referred to a probation officer, who would request a statement. (Evid. Hear. Tr. pp. 103-104.)

Walton testified that it would have been his practice in a case such as the instant one to advise Alesi to cooperate with the probation officer because in order to obtain a commitment the court must find the defendant

to be addicted to narcotics or in imminent danger of becoming addicted. If the probation officer were told that the defendant was not a user or addict his prospects of commitment would be diminished somewhat. (Evid. Hear. Tr. pp. 107-08.)

Alesi testified at the evidentiary hearing that he had a conversation with Walton in the courtroom after the plea change with respect to what information had to be supplied to the probation officer. Alesi told Walton he was not addicted and could not figure out what he could do to get to the hospital. Walton told Alesi that he would have to implicate himself in some manner for the plan to work, to obtain a commitment to CRC. Walton said that Manley Bowler, the Assistant District Attorney, was going along with the plan and it was certain to work, as long as Alesi did not "goof up or anything" in the intervew with the probation officer. (Evid. Hear. Tr. pp. 25-28.)

Alesi testified that at the interview the probation officer, Mr. Linker asked him if he was using narcotics. Alsei admitted that he was using a cap a day. Alesi testified he was not using a cap a day and had lied to the probation officer, because he thought that was "the way I was supposed to do under the plan. To be admitted to the CRC program, which was a narcotics rehabilitation center, I had to be an addict." (Evid. Hear. Tr. pp, 30-31.) Alesi testified:

> "I thought it was up to me, as long as I admit my addiction and some implication into the charge, since I entered the Guilty plea, that the plan would work that I would be admitted to the hospital, since the Assistant District Attorney was going along with it, and since the District Attorney

> and the judge and Mr. Walton, who told me to have full confidence in it, that this was a heck of a bargain, so to speak." (Evid. Hear. Tr. pp. 31-32.)

Alesi thought he was "doing (his) part" when he made the statements to the probation officer. (Evid. Hear. Tr. p. 32.)

Alesi told Linker he was present at the time of both heroin sales and Alesi testified that this was the truth. (Evid. Hear. Tr. p. 32.) He told the probation officer he was not involved in the first sale. (Evid. Hear. Tr. pp. 32-33.)

Alesi asked Linker, "Are you aware of the plan of getting me into the CRC?" Linker said, "I heard something about it, but I don't want to discuss that right now." Alesi said, "Well, this is important. I am going to CRC." Alesi believed Linker just hunched his shoulders. (Evid. Hear. Tr. p. 34.)

Linker did not tell Alesi that he had to implicate himself in order to get into the CRC program. Linker said, "I can't answer any of those questions." (Evid. Hear. Tr. p. 35.) It was Alesi's prior understanding that he would have to implicate himself. (Evid. Hear. Tr. p. 34.) Alesi asked Linker, "I would have to admit using narcotics to get in the CRC, wouldn't I?" Linker replied, "Yes, naturally, because this is for rehabilitation." (Evid. Hear. Tr. p. 35.) Linker told Alesi to tell the truth, but Alesi lied nonetheless because he was going along with the plan and thought the interview was just a "formality." (Evid. Hear. Tr. p. 37.)

Alesi submitted a written statement to Linker at Linker's request. Alesi did not recall having a conversation with Walton between the time of the interview

and the written statement. Linker told Alesi he wanted him to write down about the charges, the part he played in them, and about his addiction. (Evid. Hear. Tr. pp. 38-39.) In the written statement Alesi implicated himself, and admitted his addiction. (Evid. Hear. Tr. pp. 40-41.) The only reason Alesi did this was to get into CRC. (Evid. Hear. Tr. p. 41.)

Alesi went to CRC but was rejected after 21 days because of his parole status. (Evid. Hear. Tr. pp. 46-47.)

At Alesi's request, Walton moved to withdraw Alesi's guilty plea upon Alesi's return to court following rejection by CRC. Alesi was permitted to withdraw his guilty plea; his not guilty plea was reinstated. (Evid. Hear. Tr. pp. 48-49.)

REASONS FOR GRANTING THE WRIT

I

The Reasoning of the Ninth Circuit Is Diametrically Opposed to That of the California Supreme Court and This Court Should Resolve That Conflict

The instant case presents to this Court the diametrically opposed analyses of the California Supreme Court and the Ninth Circuit. Petitioner believes that this conflict of reasoning should be resolved by this Court. At stake is the validity of guilty pleas which result from the argumentative persuasion of counsel as to the best course of action for a defendant. The statements of a defendant to a probation officer following such a guilty plea, and their admissibility on retrial for the purpose of impeachment of the defendant's testimony, are also involved. Such issues are important to the administration of criminal justice throughout the country.

The California Supreme Court, in its opinon affirming the judgment, analyzed the issues as follows:

> "After the first trial, defendant pleaded guilty on the advice of his attorney so that prompt commitment to the California Rehabilitation Center could be arranged. At an oral interview following his plea, he told his probation officer that he was using heroin and that the marijuana cigarette discovered by the arresting officers was his. Defendant also submitted a statement in his own handwriting in which he confessed to marijuana possession and also admitted heroin use, although he did not admit the sales charged in the indictment. At the second trial, he denied the marijuana possession, and his written statement was

introduced for impeachment purposes. On cross-examination he testified that his admissions to the probation officer were made on the advice of his then attorney.

"On this record it is clear that defendant's statements to his probation officer are not embraced within the rule enunciated in People v. Quinn (1964) 61 Cal.2d 551 [39 Cal.Rptr. 393, 393 P.2d 705]. In Quinn the probation officer admonished convicted defendants that unless they were telling the truth he would not recommend probation. Since any subsequent admissions or confessions thus were induced by the promise of leniency, we held they were involuntary and therefore inadmissible in a later trial. This defendant's predicament is markedly different. His statements to the probation officer were made upon the advice of counsel. In acting with the benefit of legal advice, he cannot now complain that the information volunteered was elicited in violation of his rights under Escobedo and Dorado. People v. Brooks (1965) 234 Cal.App.2d 662, 671-672 [44 Cal. Rptr. 661]; People v. Garcia (1966) 240 Cal. App.2d 9, 12-13 [49 Cal.Rptr. 146, 15 A.L.R.3d 1352].) Thus, in a later trial the People may introduce admissions made to a probation officer, either directly or for impeachment purposes, where it affirmatively appears in the record that defendant made those admissions under the guiding hand of counsel, unless the defendant can establish that his attorney, in concert with the court or the People, misrepresented his eligibility for or likelihood of admission to the state narcotics treatment facility. (See In re Nunez (1965) 62 Cal.2d 234, 236 [42 Cal.Rptr. 6, 397 P.2d 998].)

"Here, it appears that defendant's first attorney believed he could best discharge his duty to his client, who was then on parole from a prior narcotics conviction, by securing, if possible, his admission to the California Rehabilitaton Center. There is nothing in the record to question the soundness of this advice. Thereafter, the attorney and the People, with the help of the court, fulfilled their promises to employ their best efforts to have defendant placed in the center. Indeed, he was sent there. It was at the center that he was found to be an unfit subject for treatment.

"It is not unrealistic to anticipate that a defenant rejected by the narcotics rehabilitation center, a possibility which can be foreseen, will be faced at a subsequent trial with statements made to a probation officer under the advice of counsel. An apprehensive counsel, of course, can caution the defendant that anything he says to his probation officer might be used in a subsequent trial. The critical element is that the defendant is represented by counsel; and counsel has the opportunity to fully inform him of the risks he takes by full or false disclosures to his probation officer."

People v. Alesi, 67 Cal. 2d at 860-61, 64 Cal. Rptr. at 106-07, 434 P.2d at 362-63.

In vacating the judgment of the California Supreme Court, the Ninth Circuit reasoned as follows:

"In upholding the conviction, the California Supreme Court reasoned that Alesi's damaging admissions were not involuntary because they had been made under 'the guiding hand of counsel.'

(People v. Alesi, supra, 67 Cal. 2d at 861, 64 Cal. Rptr. at 107, 434 P. 2d at 363.) The factual record before the California Supreme Court and that made at the evidentiary hearing before the district court were quite different. Upon facts first brought out at the federal hearing, the district court had ample evidence from which to find that Alesi's statements had been coerced: *Alesi's lawyer did not exercise a guiding hand; he had given his client a forceful shove.*" (Opinion, p. 3 (emphasis added).)

We submit that the record is clear that the "forceful shove" spoken of in the Ninth Circuit's opinion was no more than the ordinary and proper argumentative persuasion of counsel.

There is no doubt that defense counsel, Mr. Walton, persuaded Alesi to plead guilty and admit his addiction to the probation officer. Counsel believed Alesi was going to be convicted by the jury of at least one of the two sales of heroin charges, as well as the possession of marijuana charge. (Evid. Hear. Tr. p. 92.) The trial judge's suggestion of the possibility of a CRC commitment seemed to Walton, in Walton's words, "like not only the ideal disposition of the case, but almost a miraculous one and so I did exert strong pressures." (Statement of Walton at the hearing to vacate the guilty plea, quoted in footnote 2 of the Ninth Circuit's opinion.)

What were these "strong pressures" which the Ninth Circuit relied upon to vacate the judgment of the Supreme Court of California and which sound so sinister? Walton testified without contradiction at the evi-

dentiary hearing exactly what these "strong pressures" were which caused Alesi to plead guilty:

> "Q. Referring to the same exhibit at page 6, you indicate there at line 6 that you exerted—'strong force exerted by me personally on the defendant to withdraw his plea of guilty.' What was the strong force that you exerted to get Mr. Alesi to withdraw his plea of not guilty and enter this guilty plea?
>
> "A. *This was an argumentative kind of persuasion,* that (1) it was in his best interest to enter a plea of guilty to one count; secondly, that he would in all likelihood do many years less time in confinement; and, thirdly, he would be treated as an addict.
>
> "Q. Was he willing to go along with this at first, if you recall?
>
> "A. *I would say that he had to be persuaded;* that there was a kind of reluctance.
>
> "Q. Here in the same exhibit, page 6, line 18, you indicate again, 'so I did exert strong pressures.' These are the strong pressures that you have already testified to?
>
> "A. Yes.
>
> "Q. Is there any other inducement or strong pressure that you can recall that you used to get Mr. Alesi to change his plea?
>
> "A. No, not that I can recall." (Evid. Hear. Tr. pp. 101-02 (emphasis added).)

The above testimony was elicited by Alesi's counsel at the evidentiary hearing. Alesi himself testified only that Walton convinced him to change his plea, based on the advantages that would flow from that course and the disadvantages that would result if Alesi did not

change his plea. All that the record shows is proper argumentative persuasion by counsel. It is noteworthy that although Alesi, like most defendants, was initially reluctant to plead guilty, he never testified or suggested that he did not concur in the change of plea. Though reluctant, he voluntarily assented to the plea change after conferring with his attorney. Only because of his subsequent rejection from CRC because of his parole status, the risk of which Alesi knew and assumed, did Alesi attack his plea or statements to the probation officer. Had he been accepted at CRC it is apparent that Alesi would not have moved to withdraw his plea, nor would he have complained of his statements to the probation officer. But Alesi's subsequent rejection by CRC cannot bear on the voluntariness of his plea or statements. He was never promised a commitment, only that commitment proceedings would be commenced, with the support of the court and prosecutor. The rejection establishes only the reason why Alesi became dissatisfied, not that the plea or statements were involuntary or coerced.

The significance of this case becomes clear. There is nothing to distinguish it from countless others where an initially reluctant defendant is counseled by his attorney, is persuaded by counsel's arguments and agrees to plead guilty. We respectfully urge that the persuasion of an initially reluctant defendant cannot be deemed coercion in law such as will invalidate the defendant's plea of guilty or subsequent statements to a probation officer. The Ninth Circuit has held to the contrary.

Surely, counsel is not limited to a dispassionate presentation of the alternatives to his client. Counsel's function is to guide and counsel his client, to persuade

him as to the proper course of action. The ultimate decision whether to plead guilty or to make admissions to the probation officer in order to heighten the chance for a CRC commitment as an addict belongs to the defendant, but the advice needed to reach that decision must come from counsel. Indeed, counsel may be derelict in his duty if he does not attempt to persuade the defendant as to the proper course of action. In the instant case, if counsel for Alesi had failed to urge his client to try for the CRC commitment, might not Alesi properly complain that he had not received effective representation in that he was not made to see the advantages which that course offered?

We submit that the question presented is the proper role defense counsel plays in counseling his client with respect to a possible plea of guilty. We believe the proper governing rule is set forth in *Devers v. People of State of California*, 422 F. 2d 1263, 1264 (9th Cir.), *cert. denied*, 399 U.S. 913 (1970):

> "Devers also urges that his plea of guilty was involuntary since his attorney, his codefendant, and his codefendant's attorney joined together in persuading him to plea guilty. *It is, of course, one of an attorney's most valuable functions to persuade his client to take that course which, to the attorney, in the light of his experience, appears to be the wisest.* The District Court found that there was nothing in the record to indicate that duress or influence was applied to Devers by any other party . . ." (emphasis added)

See also *Rogers v. Wainwright*, 394 F. 2d 492, 493 (5th Cir. 1968) (counsel's advice to plead guilty to avoid the death penalty, was proper. The court stated that ". . . no federal court has held . . . that the

advice of competent counsel to plead guilty is impermissible."); *Smith v. United States,* 265 F. 2d 99, 101 (D.C. Cir.), *cert. denied,* 361 U.S. 843 (1959) (counsel "merely brought his professional judgment and experience to bear, as he was bound to do, in advising appellant (1) of the high probability of conviction, and (2) of the sentences some courts have imposed on pleas of guilty in such cases."); *United States v. Brierley,* 285 F. Supp. 78, 80-81 (E.D. Pa. 1967), *aff'd* 392 F. 2d 197 (3d Cir.), *cert. denied,* 393 U.S. 882 (1968) (counsel made no threats, he simply advised petitioner to plead guilty "after all the alternatives had been explained to him by his counsel."); *Via v. Peyton,* 284 F. Supp. 961, 965 (W.D. Va. 1968) (counsel's advice that petitioner would not be believed at trial, that to contest the charges would only enhance the term of imprisonment, and that counsel told petitioner he thought he would receive a lighter sentence if he pleaded guilty, did not amount to coercion); *Morgan v. Peyton,* 281 F. Supp. 522, 523 (W.D. Va. 1968) (petitioner's trial attorney "explained all of the possibilities to petitioner, and the ultimate decision to plead guilty was made by petitioner." The court found no "coercion" by counsel, only sound advice.)

Counsel made no misrepresentations. He did not promise Alesi a commitment. The possibility that the commitment might not result because of Alesi's parole status or other discretionary rejection by CRC was made clear to Alesi. Counsel at all times acted with the best interests of Alesi in mind. As Walton testified:

> "I was very strongly of the opinion that the plea of 'Guilty' under all the circumstances was

in Alesi's best interests; that if convicted on even one count of sale of heroin with a prior conviction—these are all things which I told him—that he would face a mandatory minimum term in prison of ten years, so he wouldn't be eligible for parole until 1973 or thereabouts, and not under any of those circumstances would he receive any treatment for his basic problem, which was addiction; that if he were to enter a plea of Guilty after the District Attorney had made a motion to strike the prior conviction, and the judge would then refer him to Department 95, that he would be processed at the Rehabilitation Center where he would be treated for his addiction where the minimum term is only six months, rather than ten years, and where at that time the average term of confinement was 15 to 18 months." (Evid. Hear. Tr. pp. 99-100.)

Again, Walton testified:

"My interest was in putting Alesi into the best position that it might be possible to put him in, judging that from two points of view: (1) his underlying addiction problem, and, (2), the amount of confinement to which he might be subject under the various alternatives." (Evid. Hear. Tr. pp. 106-07.)

Although the Ninth Circuit's opinion states that new facts developed at the evidentiary hearing compel the overturning of Alesi's conviction, in fact it is a disagreement with the applicable law as stated by the California Supreme Court which has caused this result.

The additional facts developed at the evidentiary hearing unequivocally confirm the reasoning of the California Supreme Court, and relief was not proper under 28 U.S.C. §2254(d). It is the reasoning of the Ninth Circuit which differs from that of the California Supreme Court.

The very fact central to the opinion of the California Supreme Court is the same fact used by the Ninth Circuit to reach the opposite conclusion. It is the selfsame intimate involvement of defense counsel at every step, his guidance of his client's actions at every stage, which the California Supreme Court found to be the necessary "guiding hand of counsel" needed to make Alesi's statements admissible, and which the Ninth Circuit construes to be the "coercion" necessary to invalidate Alesi's plea and statements.

It appears to us that the Ninth Circuit felt that using Alesi's statements to impeach him was unfair since the commitment did not eventuate. But Alesi was never promised a commitment and the chance that it might not be realized was apparent. The California Supreme Court considered this question and reasoned:

> ". . . . Thereafter, the attorney and the People, with the help of the court, fulfilled their promises to employ their best efforts to have defendant placed in the center. Indeed, he was sent there. It was at the center that he was found to be an unfit subject for treatment.
>
> "It is not unrealistic to anticipate that a defendant rejected by the narcotics rehabilitation center, a possibility which can be foreseen, will be faced at a subsequent trial with statements made to a probation officer under the advice of counsel. An apprehensive counsel, of course, can

> caution the defendant that anything he says to his probation officer might be used in a subsequent trial. The critical element is that the defendant is represented by counsel, and counsel has the opportunity to fully inform him of the risks he takes by full or false disclosures to his probation officer." *People v. Alesi, supra,* 67 Cal. 2d at 861, 64 Cal. Rptr. at 107, 434 P.2d at 363 (1967).

Other defendants are faced with even more difficult decisions than was Alesi, and their pleas and actions have not been found to be coerced. In *Brady v. United States,* 397 U.S. 742 (1970), this Court recently held that fear of the death penalty may indeed present hard choices to the defendant as to whether to plead guilty, but fear of the death penalty does not amount to coercion. *See also Parker v. North Carolina,* 397 U.S. 790 (1970); *McMann v. Richardson,* 397 U.S. 759 (1970) (petitioner was persuaded by his attorney to plead guilty to avoid the electric chair over petitioner's protestation that he "did not want to plead guilty to something he did not do." 397 U.S. at 763.)

The instant case is indistinguishable from *Brothers v. United States,* 431 F.2d 644 (9th Cir. 1970). There a narcotics addict who desired a civil commitment to a state narcotics treatment program pleaded guilty because his attorney told him that was the only way he could get cured of his drug addiction problem. The court cited *Devers, supra,* with approval concerning the function of counsel in advising a defendant and concluded with these words, fully applicable to the instant case:

> "Here we find no deception, coercion or unfairness on the part of the court or the prosecution,

nor any ignorance nor inadvertence on the part of the defendant; but a carefully considered and weighed and knowing exercise of judgment by both defendant and his counsel, with full knowledge and realization of what was being done, and why." *Id.* at 646.

II

Harris v. New York Sanctions the Admissibility of Alesi's Statements on Rebuttal for the Purpose of Impeachment

The prosecution in the instant case did nothing more than impeach Alesi by virtue of his prior inconsistent statements to the probation officer. Such impeachment, we respectfully submit, is sanctioned by *Harris v. New York,* 39 U.S.L.W. 4281 (Feb. 24, 1971), which in turn relies upon *Walder v. United States,* 347 U.S. 62, 65 (1954).

The Ninth Circuit held that Alesi's statements are not admissible under *Harris* because they are not sufficiently trustworthy since they were involuntary. We submit that the statements were sufficiently trustworthy to allow the jury to determine whether Alesi was telling the truth on the witness stand. As stated in *Harris,* 39 U.S.L.W. at 4282:

> "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility. . . ."

That aid should not be lost and Alesi should not be granted "a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances," in the words of *Harris.* 39 U.S.L.W. at 4283. Alesi was permitted by the court to withdraw his guilty plea, but he was not permitted to testify under oath without being subject to impeachment with

his prior inconsistent statements to the probation officer. Alesi was permitted to testify why he had made the statements, and if the jury believed his explanation there would be no occasion to distrust his testimony at trial on that ground. But this determination was for the jury to make under *Harris*.

III

The Admission of the Statements Was Harmless Error

Even assuming, *arguendo*, that Alesi's statements were inadmissible even for impeachment under *Harris*, their admission was harmless error under *Chapman v. California*, 386 U.S. 18, 24 (1967).

Alesi told the probation officer only that the marijuana cigarette found in his shirt pocket at the time of arrest was his (a fact he could not very well deny in view of the rather personal location of the cigarette in his shirt pocket). But Alesi had already admitted that fact on lawful questioning at the time of arrest. He also told the probation officer he had been regularly using heroin, but in view of the fact that he had so stated at the time of his arrest as well, and had admitted previously on cross-examination that he had been addicted to heroin, such admission was clearly harmless. Never did Alesi admit the two sales of heroin. Under such circumstances the challenged statements were cumulative of other admissible evidence and any error was therefore harmless. Compare *People v. Jacobson*, 63 Cal. 2d 319, 330-31, 46 Cal. Rptr. 515, 405 P. 2d 555 (1965). See *Harrington v. California*, 395 U.S. 250 (1969).

Conclusion

For the foregoing reasons, it is respectfully requested that a writ of certiorari be granted to resolve the conflict between the reasoning of the California Supreme Court and the Ninth Circuit; to determine the voluntariness of Alesi's guilty plea and statements following plea under *Brady v. United States, Parker v. North Carolina* and *McMann v. Richardson;* to determine the applicability of the recent decision in *Harris v. New York* to Alesi's statements; and to determine whether any conceivable error was harmless beyond a reasonable doubt under *Chapman v. California.*

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit

United States Court of Appeals, for the Ninth Circuit.

Daniel William Alesi, Petitioner-Appellee, v. Walter E. Craven, Warden, Respondent-Appellant. No. 24,-821.

[April 1, 1971].

Appeal From the United States District Court for the Central District of California.

Before: BARNES, HUFSTEDLER, and TRASK, Circuit Judges:

HUFSTEDLER; Circuit Judge:

This is an appeal from an order vacating Alesi's state court conviction for selling heroin and possessing marihuana.[1] His conviction had been affirmed by the California Supreme Court prior to his seeking federal relief in his habeas petition. (*People v. Alesi* (1968) 67 Cal. 2d 856, 64 Cal. Rptr. 104, 434 P.2d 360.) The foundation of the district court's order was its finding that inculpatory statements made by Alesi to a probation officer were involuntary and its conclusion that the admission of those statements to impeach Alesi during the state court trial was not harmless beyond a reasonable doubt.

The statements in question arose in the context of an abortive plea bargain. In 1962, Alesi was charged with the offenses for which he was later convicted and with a prior felony. After trial had commenced, the state trial judge called the prosecutor and defense

[1]Because Alesi was serving a sentence on a prior conviction, the court did not order Alesi's immediate release.

counsel into chambers and urged Alesi's commitment to the California Narcotics Rehabilitation Center, assuming that the prosecutor would be willing to dismiss the prior and that the Center's Director would accept Alesi for treatment. The district attorney then agreed to dismiss the prior and defense counsel agreed that Alesi would plead guilty to one count of selling heroin. Alesi initially rejected the bargain, claiming that he was innocent, but after defense counsel exerted strong pressure upon him,[2] Alesi relented and entered a guilty plea. Defense counsel had told Alesi that he had to anticipate that the probation officer would insist upon Alesi's admitting addiction as a condition precedent to acceptance at the Center. The probation officer fulfilled defense counsel's prophecy. Alesi admitted that he had possessed the marihuana and that he was addicted to heroin. He also gave the probation officer his version of the heroin sale.

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[2]At the hearing to vacate the guilty plea, Alesi's counsel stated:

"In view of the severity of punishment for a heroin sale with a prior narcotic conviction of any kind, the defendant being an admitted addict, was persuaded and even induced to withdraw his plea of not guilty, enter his guility plea on the basis of representations which I made to him, and which were themselves predicated upon conversations which I had with Your Honor and the other counsel in chambers.

". . . .

". . . . [T]here was a strong force exerted by me personally on the defendant to withdraw his plea of not guilty and enter his plea of guilty, because I saw the possibility, one of getting the marijuana case dismissed; two of avoiding what I thought the probability was of a ten year to life sentence, of which he would have to do ten years; and three, the possibility presented itself that he would be committed to the addiction program over in Riverside County and might be in a position to cure a habit that has up to this point pretty well ruined his life.

"To me it seemed like not only the ideal disposition of the case, but almost a miraculous one and so I did exert strong pressures.

The Center rejected Alesi on the ground that he was on parole, and he was returned for sentencing. Alesi moved to vacate his guilty plea, the court vacated the plea upon a finding that it was involuntary, and stated: "If the defendant wants to be placed back in a status quo before he changed his plea, we will do so in every respect." Upon Alesi's request, the court also relieved defense counsel of his representation and appointed a new lawyer for him.

Alesi's second trial before a different judge was held without any pretrial hearing upon the voluntariness issue. Alesi testified in his own defense, and the prosecutor sought to impeach him by questioning him about the statements he had made to the probation officer. Alesi repeatedly asserted that his statements had been made under duress; those assertions were stricken. On redirect examination defense counsel tried to lay the foundation for the involuntariness claim by bringing out the guilty plea that anteceded the inculpatory statements. The plea of guilty was thus introduced, but defense counsel was not permitted to show the circumstances of the plea.

In upholding the conviction, the California Supreme Court reasoned that Alesi's damaging admissions were not involuntary because they had been made under "the guiding hand of counsel." (*People v. Alesi, supra,* 67 Cal.2d at 861, 64 Cal. Rptr. at 107, 434 P.2d at 363.) The factual record before the California Supreme Court and that made at the evidentiary hearing before the district court were quite different. Upon facts first brought out at the federal hearing, the district court had ample evidence from which to find that Alesi's statements had been coerced: Alesi's lawyer

did not exercise a guiding hand; he had given his client a forceful shove.

The pressure he exerted had been set in motion by the first trial judge. The trial judge's active entry into the plea bargaining was well intentioned, but when the move was made, the trial judge did not know the facts that ultimately doomed the pact.[3] When that judge vacated the plea and tried to restore Alesi to the position he had occupied before the plea was taken, the judge recognized that the plea bargaining atmosphere had been coercive.[4] The plea, the challenged statements, and the plea bargain are inextricably intertwined.

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[3]During the hearing on Alesi's motion to vacate his plea, the first trial judge stated:

> "However, the possibility of his getting treatment certainly must have been in his mind and certainly it was in the Court's mind because in accepting the plea of guilty and in setting aside the prior, it was in the Court's mind that the community would be benefited by seeing that this defendant got treatment because the testimony up to the point that I heard it, I think indicated that the main reason for his participating in the transaction was so that he could get a small bit of narcotics for his own uses rather than financial gain.
>
> "So perhaps it could be said that the Court's actions apparently substantially corroborated his hopes or beliefs that he would get treatment rather than himself a straight prison sentence, and I am free to say I had thoughts along the same line, that is, that he might be accepted for treatment, because I did inquire and look up the law and found that the law would permit his treatment."

[4]The court stated:

> "[T]he discussions certainly did, with regard to his change of his plea, the discussion certainly did revolve around this question of whether or not, if he changed his plea, he might have a chance to get the treatment program and whatever representations or understanding he may have had were certainly, shall we say, to follow the language of *People vs. Gilbert*, 'apparently substantially corroborated by acts or statements of a responsible state official.' "

From the district court's finding of involuntariness of the statements, it follows that the state court erred in admitting them against Alesi, either directly or by way of impeachment. (*E.g., Haynes v. Washington* (1963) 373 U.S. 503; *Lynumn v. Illinois* (1963) 372 U.S. 528; *Harrold v. Territory of Oklahoma* (8th Cir. 1909) 169 Fed. 47; *State v. Turnbow* (1960) 67 N.M. 241, 354 P.2d 533, 89 A.L.R.2d 461, Anno. at 478.)

Harris v. New York (Feb. 24, 1971) ... U.S. ..., a case that came down after oral argument, is not to the contrary. *Harris* held that statements taken during custodial interrogation without *Miranda* warnings could be used by the prosecution to impeach the declarant when he testifies at his later criminal trial. That the Court did not intend to reach beyond the *Miranda* setting to touch an involuntary or coerced confession is apparent from its observation that: "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, *provided of course that the trustworthiness satisfies legal standards.*" (.... U.S. at ..... [Emphasis added.])

Alesi's statements to his probation officer included a confession on one charge and incriminating admissions on the other charges. We cannot distinguish an admission from a confession. (*Ashcraft v. Tennessee* (1946) 327 U.S. 274.) Both were coerced. Nothing in *Harris* purports to undercut the many decisions that recognize the unreliability of involuntary confessions.

(*E.g., Stein v. New York* (1952) 346 U.S. 156, 192; J. Wigmore, 3 *Evidence* (Chadbourne Rev. 1970) §822.)

We decline appellant's invitation to return the case to the California courts before granting relief. We can see no useful purpose in prolonging the litigation and expending even greater quantities of judicial time upon this case. Alesi exhausted his state remedies; he is entitled without further delay to the relief he has won.

The Order vacating the state court's decision is AFFIRMED.

APPENDIX B

Memorandum and Order Granting Relief on Petition for Writ of Habeas Corpus

United States District Court, Central District of California.

Daniel William Alesi, Petitioner, v. Walter E. Craven, Warden, Respondent. Civil No. 68-1329-HP.

Filed June 19, 1969.

Petitioner, Daniel William Alesi, was convicted by jury verdict on August 14, 1963 of violating California Health and Safety Code § 11501 (sale of heroin), two counts, and California Health and Safety Code § 11530 (possession of marijuana), with one prior conviction. On September 20, 1963 he was sentenced to serve a term of 10 years to life on the heroin convictions and 2-20 years on the marijuana conviction, the sentences to run concurrently.

STATEMENT OF FACTS

The evidence at the trial disclosed the following facts. On June 12, 1962 Officer White, a Deputy Sheriff for Los Angeles County, went to the residence of an informant named Baldry. Baldry was then under indictment for narcotics violations and had agreed to work for the police. While White was there, Alesi and his girlfriend, Miss Patricia Hardy, drove up in Hardy's automobile and parked outside. White gave Baldry $40 to make a heroin purchase from Alesi and Hardy. Baldry got into the car and the three drove away.

They came back in an hour and either Alesi or Miss Hardy handed to Baldry two balloons containing heroin.

On June 15, 1962 Baldry telephoned Miss Hardy and arranged a meeting with her at a restaurant. Baldry went to the restaurant with Officer White and waited. Hardy arrived with Alesi. Alesi claimed that he knew nothing of this arranged meeting and that he was on a date with Miss Hardy. Hardy then drove off to buy some heroin with $75 that White had given her. Alesi was opposed to this and argued with Miss Hardy about it. Alesi, Baldry, and White waited at the restaurant for Hardy.

After Hardy had been gone for a long time, White expressed concern that she might have "burned him." Alesi assured him that she wouldn't do that. He and Baldry got into White's automobile and the three of them went looking for Hardy at a location where Alesi thought she might be purchasing the heroin. They found Hardy's car, and White let Alesi out to go find Hardy. White and Baldry then drove back to the restaurant. Later, Alesi and Hardy returned to the restaurant in Hardy's car. Miss Hardy produced a condom containing heroin and started to give it to White but took out some for herself, for her services. She then thought that she took too much and started to put some of it back, but Alesi interrupted and said that she hadn't taken too much and shouldn't put any back. Hardy then gave the condom to Alesi to tie a knot in it. The condom was then given to White.

Because of the foregoing transaction and perhaps for other reasons, Alesi and Hardy terminated their relationship. Alesi was arrested on August 11, 1962 at the apartment of another girlfriend, Miss Janice

Kline, and her sister. When he was arrested, Alesi was seated on a bed. Near him lay a hammer, which Miss Kline kept in her bedroom for protection. The police came in with a warrant, with their guns drawn, and ordered Alesi to stand and raise his hands. He sat there, apparently stunned. The police pushed him over on the bed, away from the hammer. Upon searching Alesi, they found a marijuana cigarette in his shirt pocket. Upon questioning, he admitted possession of the cigarette and knowledge that it was marijuana. Alesi claims that the police threatened to arrest Miss Kline for the marijuana cigarette, that she was crying, and that he admitted possession of the cigarette only to protect her from being charged.

The next day, Alesi called Miss Kline from jail and told her that there was something in her car that didn't belong there and that she should get rid of it. Miss Kline's sister searched the car and found a narcotics injection kit. They then called the police and informed them of the kit.

JUDICIAL PROCEEDINGS

Alesi was tried with Miss Hardy as a co-defendant. The trial began on January 8, 1963, Alesi being represented by Attorney Richard Walton. After a few days of trial, Judge Robert Clifton asked to see counsel in chambers. He suggested that a proper disposition of the case might be to commit the defendants to the California Narcotics Rehabilitation Center. There was some question concerning Alesi's eligibility for the program, especially if Alesi was found guilty with a prior conviction.

An arrangement was made whereby Alesi would plead guilty to one count of heroin sale, with the prior

conviction and the other charges being dismissed. Alesi's attorney and the Judge felt that Alesi would then be accepted for narcotics rehabilitation.[1] Alesi resisted, and his attorney exerted "strong force" to induce him to plead guilty.[2]

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[1]At the time the guilty plea was accepted, Judge Clifton stated:

> "We will grant the motion, and for the record I want to say that this recommendation of striking the prior was made at the suggestion of the Court. It was my own suggestion.
>
> From the evidence that I have so far heard and other information, it would appear that because of the youth of the defendants this should be done, and also because the facts would indicate that any sale made by the defendants Alesi and Hardy was not for motive of profit, but because of their desire to obtain a portion of the drug for their own use, and that I think should weigh very greatly under our treatment, our new treatment laws [narcotic rehabilitation treatment]. . . ." Exhibit 6, pp. 154-155.
>
> "The Court has in mind, of course, referring the matter to Department 95 for processing under the treatment program, but I understand that it is usually, as a part of that referral, that we do get a probation report to guide them there, so that we will first get the probation report and then make the referral to 95." Exhibit 6, pp. 160-161.

At the subsequent hearing on the motion to vacate the guilty plea, Alesi's attorney, Mr. Walton, stated:

> "Here the defendant was told by me that if he would withdraw his plea of not guilty, enter a plea of guilty, that he would be referred to the hospital program, his prior narcotic conviction would be stricken and the marijuana case was dismissed." Exhibit 7, p. 7.

[2]At the hearing on the motion to vacate the guilty plea Alesi's attorney stated:

> "[T]he defendant . . . was persuaded and even induced to withdraw his plea of not guilty, enter his guilty plea on the basis of representations which I made to him, and which were themselves predicated upon conversations which I had with Your Honor and the other counsel in chambers." [Exhibit 7, p. 4.
>
> . . . .
>
> "I can vouch that there was a strong force exerted by me personally on the defendant to withdraw his plea of [not] guilty. . . ." Exhibit 7, p. 6.

(This footnote is continued on next page)

Alesi continued to assert that he was not using heroin and that he was not the one who sold the heroin.[3] But he believed that in order to be accepted into the narcotics rehabilitation program it was necessary for him to admit addiction and implicate himself in some way in the alleged crimes.[4]

Alesi pled guilty to the first heroin count. Two weeks later, while he was in jail, he was visited by a probation officer, who interviewed him in order to determine whether he would be suitable for the narcotics rehabilitation program. The probation officer stated to Alesi that he would have to admit using narcotics in order to be eligible for the program.[5] Alesi made oral and written statements to the probation officer, including an admission of possessing the marijuana cigarette, an admission of addiction and use of heroin, and an account of his version of the events leading up to his arrest.

The plan failed and Alesi was rejected for treatment at the California Rehabilitation Center on the ground

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At the evidentiary hearing the attorney stated:

> "I was very strongly of the opinion that the plea of 'Guilty' under all the circumstances was in Alesi's best interests; that if convicted on even one count of sale of heroin with a prior conviction—these are all things I told him—that he would face a mandatory minimum term in prison of ten years, so he wouldn't be eligible for parole until 1973 or thereabouts, and not under any of those circumstances would he receive any treatment for his basic problem, which was addiction; that if he were to enter a plea of Guilty after the District Attorney had made a motion to strike the prior conviction, and the judge would then refer him to Department 95, that he would be processed at the Rehabilitation Center where he would be treated for his addiction where the minimum term is only six months, rather than ten years, and where at that time the average term of confinement was 15 to 18 months." [R.T. 99-100]

[3]R.T. 17, 22, 112-113.

[4]R.T. 25-28.

[5]R.T. 34-36.

that he was on parole for a prior offense. He was returned to the court for sentencing.

On April 17, 1963 the court, upon motion by Alesi, found the guilty plea to have been involuntary.[6] The guilty plea was vacated and the prior charges were reinstated. The court stated, "If the defendant wants to be placed back in a status quo before he changed his plea, we will do so in every respect."[7]

At Alesi's request, his attorney, Richard Walton, was relieved. The court appointed for Alesi another attorney, Eugene V. McPherson. The second trial began on July 30, 1963 before Judge Alfred Peracca. Alesi testified at the trial. On cross examination, the prosecution sought to impeach him with the statements that he had made to the probation officer. Alesi resisted admitting that he had made statements to the probation officer and repeatedly asserted that he made the statements to the probation officer under duress.[8] His attorney did not object to the questioning, however, and

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[6]Judge Clifton stated:

"However, the possibility of his getting treatment certainly must have been in his mind and certainly it was in the Court's mind because in accepting the plea of guilty and in setting aside the prior, it was in the Court's mind that the community would be benefited by seeing that this defendant got treatment because the testimony up to that point that I heard it, I think indicated that the main reason for his participating in the transaction was so that he could get a small bit of narcotics for his own uses rather than financial gain.

So perhaps it could be said that the Court's actions apparently substantially corroborated his hopes or beliefs that he would get treatment rather than himself a straight prison sentence, and I am free to say I had thoughts along the same line, that is, that he might be accepted for treatment, because I did inquire and found that the law would permit his treatment." Exhibit 7, pp. 16-17.

[7]Exhibit 7, p. 18.

[8]Exhibit 8, p. 335, Exhibit 9, pp. 343-344.

the statements to the probation officer were brought into evidence. No hearing was held to determine whether the statements were made voluntarily.

Apparently in an abortive attempt to lessen the impact of the introduction of the admissions and confessions made to the probation officer, Alesi's attorney then brought out on redirect examination that Alesi had pled guilty to one of the counts and tried to show that his statements to the probation officer were made in an attempt to obtain treatment for narcotic addiction.[9]

The jury found Alesi guilty on all three counts. He appealed from the judgment. The Supreme Court of California affirmed the conviction.[10]

HABEAS CORPUS PROCEEDINGS

Alesi filed a petition for a writ of habeas corpus in this Court on August 12, 1968. He attacked his conviction on a number of grounds. The respondent, represented by Thomas Kerrigan, Deputy Attorney General for the State of California, filed a Return to the Court's order to show cause. Alesi filed a Traverse to the Return. On October 31, 1968 the Court dismissed the petition because it did not appear that Alesi had exhausted his available State remedies by first presenting the issues to the California courts. In a Motion to Reconsider, Alesi brought to the Court's attention some supplemental briefs that he had filed in the State courts, which indicated that he had previously raised in the State courts all of the grounds presented in this petition. The Court then found that,

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[9]Exhibit 9, pp. 376-400.

[10]*People v. Alesi*, 67 Cal. 2d 856, 64 Cal. Rptr. 104, 434 P.2d 360 (1968).

although the issues were presented to the State courts, the State courts had failed to make a determination that the statements made at the time of arrest and the statements made to the probation officer were voluntary. It therefore appeared that an evidentiary hearing was required under *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964). It also appeared that the question of whether Alesi received effective assistance of counsel at the second trial should be considered. The other issues raised in the petition appeared to present no constitutional question.

The Court appointed Attorney Gabriel A. Gutierrez to represent Mr. Alesi, without fee. An evidentiary hearing was held on April 1, 1969. Further hearing was held on April 22, 1969. Petitioner then filed a memorandum of points and authorities, respondent filed a memorandum of points and authorities in opposition to the petition, and petitioner filed a reply memorandum. The matter was then taken under submission by the Court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having heard the testimony of Alesi and the testimony of Officer John Meyers at the evidentiary hearing, and having considered the briefs of counsel, this Court now finds that the statements made at the time of the arrest were not involuntary. Moreover, the trial preceded the decisions in *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758 (1964) and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), so that those cases do not apply. *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966).

The Court finds that the statements made to the probation officer were involuntary. Alesi's attorney exerted "strong pressures" on him to persuade him to plead guilty. He led Alesi to believe that he would be accepted into the narcotics rehabilitation program. The prosecutor, by dismissing the other charges and the prior, and the court, by referring Alesi to the narcotics rehabilitation program, confirmed his mistaken belief that he would be placed in the narcotics rehabilitation program and would be released within two years, providing that he went along with the plan and implicated himself in his statements to the probation officer.[11] There is little doubt that the trial court, the prosecutor, and Alesi's attorney were acting with good intentions and sincerity; there was substantial danger that Alesi would be convicted on at least one heroin count and would be sent to prison for a long mandatory term without receiving any treatment for addiction. Judge Clifton felt that Alesi would be accepted into the program and that this would be in the best interests of Alesi, and a social benefit as well.[12]

The Court finds that this case is essentially indistinguishable from *People v. Quinn,* 61 Cal. 2d 551, 39 Cal. Rptr. 393, 393 P.2d 705 (1964). Quinn pled guilty to a charge of robbery and was later interviewed by a probation officer. The probation officer admonished Quinn that unless he told him the truth and told him everything, that he would not likely be recommended for probation. After making statements to the probation officer, Quinn was permitted to withdraw his plea of guilty. At the trial the probation officer testified regarding the statements Quinn made to

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[11]nn. 1, 2, 4, 5, 6, *supra.*

[12]nn. 1, 6, *supra.*

him. The California Supreme Court reversed the conviction on the ground that the statements to the probation officer were induced by promises or threats and that the statements were involuntary and inadmissible.[13] This Court agrees with the logic and reasoning of the *Quinn* decision and follows it here.

The California Supreme Court distinguished *Quinn* in the Alesi case[14] on the ground that Alesi made his statements to the probation officer under the "guiding hand of counsel." But, as disclosed at the evidentiary hearing, the only time Alesi received advice from counsel was prior to and at the time that Alesi entered his plea of guilty.[15] His plea of guilty was also made with the advice of counsel, and the trial court found, under the circumstances, that the guilty plea was not voluntarily made. It was on that basis that the guilty plea was vacated. Both the plea of guilty and the statements made to the probation officer were part of the same plan to receive admission to the California Narcotics Rehabilitation Center and were made under the same "guiding hand of counsel." Thus it would be incongruous to hold that the guilty plea was involuntary but the statements to the probation officer were not.

Moreover, by pleading guilty, Alesi effectively waived his rights against self-incrimination as to the first heroin

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[13]"The probation officer, who was to make a report and a recommendation to the trial judge before sentencing, told defendant that he would not recommend probation if defendant failed to tell the truth. Defendant's admissions following this threat or implied promise of leniency were therefore involuntary, and their introduction into evidence requires reversal." 61 Cal. 2d at 554, 39 Cal. Rptr. at 395.

[14]n. 10, *supra.*

[15]R.T. 31, 103.

sale[16] and could not expect to be tried on the other charges. His attorney, rather than warn him about making statements to the probation officer, led him to believe that he should do so, and this advice was corroborated by the action of the court, the prosecutor, and to a slight extent by the probation officer.[17]

This Court agrees with principles expressed by the California Supreme Court in this case; but, having considered the evidence disclosed at the evidentiary hearing, the Court interprets the facts differently. The California Supreme Court stated:

> "Thus, in a later trial the People may introduce admissions made to a probation officer, either directly or for impeachment purposes, where it affirmatively appears in the record that the defendant made those admissions under the guiding hand of counsel, unless the defendant can establish that his attorney, in concert with the court or the People, misrepresented his eligibility for or likelihood of admission to the state narcotics treatment facility."[18]

From the evidence at the evidentiary hearing, and reviewing the statements of the trial court at the time the guilty plea was withdrawn, it seems that Alesi was led to the erroneous belief that he was eligible for, and would be accepted by the narcotics treatment facility.

Because the statements made to the probation officer were involuntary, they were inadmissible and

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[16]*McCarthy v. United States*, ... U.S. ....., 89 S.Ct. 1166, 1171 (1969).

[17]R.T. 28-36, 107-108; n. 6, *supra.*

[18]67 Cal. 2d at 861, 64 Cal. Rptr. at 107.

could not be used, even for impeachment. *Groshart v. United States,* 392 F.2d 172 (9th Cir. 1968); *United States ex rel. Hill v. Pinto,* 394 F.2d 470 (10th Cir. 1968). Use of the statements constitutes prejudicial error, which invalidates the conviction. *Lynum v. Illinois,* 372 U.S. 528, 83 S.Ct. 917 (1963). Moreover, use of the statements gave an advantage to the prosecution and prevented Alesi from being returned to the "status quo" before the guilty plea was entered, as Judge Clifton indicated would be done.[19]

Having determined that the statements to the probation officer were involuntary and inadmissible and that the conviction was therefore invalid, there is no need to make a final determination on the other issues raised in the petition. It does not appear that Alesi is entitled to immediate release, however, because he is presently serving a sentence for his prior conviction, on which parole was revoked. Granting a writ of habeas corpus at this time would therefore not be warranted. But Congress has authorized this Court "to fashion appropriate relief other than immediate release." *Peyton v. Rowe,* 391 U.S. 54, 66, 88 S.Ct. 1594 (1968).

IT IS ORDERED that the judgment in *People v. Alesi,* Case Nos. 261993 and 262604, in the Superior Court of the State of California for the County of Los Angeles, be vacated and set aside.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Memorandum and Or-

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[19] n. 7, *supra.*

der, by United States mail, upon the Attorney General of the State of California, the respondent, petitioner and his counsel, the Honorable Joseph A. Wapner, Presiding Judge of the Superior Court of Los Angeles County, and the Honorable William B. Keene, Presiding Judge of the Criminal Courts Department of the Superior Court of Los Angeles County.

Dated: June 19, 1969.

/s/ Harry Pregerson
Harry Pregerson
United States District Judge

APPENDIX C

28 U.S.C. Section 2254(d)

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."